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No. 207

In the Supreme Court of the United States

OCTOBER TERM, 1946

EMORY S. LAND, CHAIRMAN, UNITED STATES MARITIME COMMISSION, HOWARD L. VICKERY, VICE CHAIRMAN, UNITED STATES MARITIME COMMISSION, AND EDWARD MACAULEY, JOHN M. CARMODY, AND RAYMOND S. MCKEOUGH, MEMBERS OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR ESTATES COMPANY, AND H. M. LORBER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of John M. Carmody and Raymond S. McKeough, members of the United States Maritime Commission, Emory S. Land, former Chairman of the Commission, and Edward Macauley, a former member of the Commission,[1] prays that a writ of certiorari

[1] Emory S. Land and Edward Macauley resigned from the Commission on January 15, 1946, and May 21, 1946, respectively. Howard L. Vickery died on March 21, 1946. These

issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on March 18, 1946.

OPINIONS BELOW

The District Court of the United States for the District of Columbia wrote no opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 162–170) is reported at 154 F. (2d) 307.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1946 (R. 171–172). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the accepted procedure under Section 37 of the Judicial Code, which allows a district court to search the entire record for jurisdictional facts when its jurisdiction is questioned, is inapplicable to a proceeding where the jurisdictional doubt rests on the circumstance that the suit may be one against the United States, so that the district court must retain jurisdiction and

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facts are suggested by a motion, filed herewith, to substitute W. W. Smith, present Chairman of the Commission, who took office on June 1, 1946, and Richard Parkhurst, who became a member of the Commission on February 20, 1946. One vacancy exists in the membership of the Commission at this time.

proceed to a trial on the merits solely by virtue of allegations that the defendants are in unlawful possession of property under a void claim of title by the United States, where, at a hearing on motion for a preliminary injunction, uncontroverted evidence adduced by the defendants established the title of the United States.

2. Whether a suit brought against government officers to obtain possession of stock held by such officers under a claim of absolute ownership by the United States with documentary legal title in the United States, on the ground that such stock had been pledged to secure an indebtedness now satisfied, is a suit against the United States.

3. Whether the United States Maritime Commission, an agency of the United States, is subject to suit.

STATUTES INVOLVED

Section 37 of the Judicial Code, 28 U. S. C. 80, provides in part:

> If in any suit commenced in a district court * * * it shall appear to the satisfaction of the said district court, at any time after such suit has been brought * * * *, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, * * * the said district court shall proceed no further therein, but shall dismiss the suit * * * and shall make such order as to costs as shall be just.

Section 201 (a) of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U. S. C. 1111, provides in part:

> An agency is hereby created, to be known as the United States Maritime Commission (hereinafter referred to as the Commission). The Commission shall be composed of five persons, in this title referred to as members, to be appointed by the President by and with the advice and consent of the Senate. The President shall designate the member to act as chairman of the Commission, and the Commission may elect one of its members as vice chairman * * *.

Section 207 of the Merchant Marine Act, 1936, 49 Stat. 1988, as amended by Section 2 of the Act of June 23, 1938, 52 Stat. 954, 46 U. S. C. 1117, provides in part:

> The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. * * *.

STATEMENT

In April 1937, Dollar Steamship Lines, Inc., Ltd. (hereinafter called Dollar of Delaware) owed the United States more than $15,000,000, on ship sales notes, construction loans and other obligations, of which $3,000,000 had long been in default (R. 23). The company also was indebted to private creditors in an amount exceeding $2,000,000, and was without sufficient net income or current assets to meet amortization requirements (R. 23). Defaults on both Government and private obligations were increasing steadily (R. 23). Vessel maintenance had been neglected and sailings were made only with the greatest difficulty (R. 23). Both the Government and the company, in early 1937, had bankruptcy proceedings under consideration (R. 23).

The service operated by Dollar of Delaware, the only American-flag shipping service from the Pacific Coast to the Far East, had been found by the Maritime Commission to be essential to the commercial and military welfare of the United States (R. 22). Bankruptcy proceedings would have seriously interrupted and impaired this service (R. 23–24, 27). Further, such proceedings would have resulted in serious losses to trade creditors and considerable unemployment (R. 23–24).[2]

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[2] It was estimated that bankruptcy of the company would have resulted in an annual loss of purchasing power on the West Coast of approximately $10,000,000 (R. 26).

Nor could the Commission buttress Dollar of Delaware's position by an operating subsidy because it could not make the required statutory finding that the company possessed financial resources necessary to conduct the shipping operations involved (R. 24).[3] On the contrary, the Commission found that Dollar of Delaware was on the brink of bankruptcy and was being operated inefficiently (R. 22).

In an effort to preserve this essential steamship service, a partial rehabilitation of the company, including adjustment and capitalization of trade, bank, and intercompany debt, and the reconstitution of the board of directors, was consummated on January 25, 1938 (R. 24).[4] However, Dollar of Delaware's financial position continued to deteriorate and by March 1938 a complete cessation of its service was imminent (R. 25).

On April 28, 1938, the Commission advised respondent Dollar that it would arrange a five-year operating subsidy if the existing indebtedness of Dollar of Delaware to the Government could be

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[3] Even if an operating subsidy contract had existed, the default of Dollar of Delaware on obligations due the United States would have compelled the withholding of subsidy payments by the Commission (R. 24).

[4] A detailed report of this partial rehabilitation, entitled "Financial Readjustments in Dollar Steamship Lines, Inc., Ltd.," was made to Congress by the Maritime Commission on February 17, 1938 (R. 22). By stipulation (R. 172–173), this printed report, which is Exhibit "A–1" to the affidavit of Emory S. Land (R. 22), has not been reprinted.

guaranteed, the guarantees to be secured by a pledge of Dollar of Delaware's common stock (R. 25). This proposal was rejected (R. 25). Thereafter, the Dollar interests (respondents herein) suggested that the common stock held by them be transferred to the Commission (R. 25–26). The Commission accordingly authorized negotiations for the acquisition of this stock, the negotiations culminating in the contract of August 15, 1938, with respondents (and certain other stockholders) (R. 26–27, 8–18).

Briefly, the contract provided for the transfer by respondents of their common stocks in Dollar of Delaware (R. 9–11). In return, respondents Dollar of California and R. Stanley Dollar were released from their liability as co-obligors on Dollar of Delaware's obligation to the United States (R. 13–14).[5] Respondents R. Stanley Dollar and Lorber were also released from their obligations to Dollar of Delaware and indemnified by the latter with respect to their obligations to third parties (R. 13–14). The agreement contemplated a five-year operating subsidy to Dollar of Delaware, a loan from the Commission to the company

[5] The release of Dollar of California substantially benefited all respondents—as did certain mutual releases effected by the contract—by reason of stock ownership in Dollar of California and related companies. See Chart immediately preceding page 1 of Exhibit A–1 to the affidavit of Emory S. Land.

for vessel repair and reconditioning, and a working capital loan from the Reconstruction Finance Corporation (R. 15).

The transaction was completed prior to the close of 1938 (R. 27–28, 29). Respondents endorsed their common stock in blank and such stock, with transfer tax stamps affixed, was delivered to the Maritime Commission on October 26, 1938, through an escrow agent (R. 27–28).* Following the agreement of August 15, 1938, the name of Dollar of Delaware was changed to American President Lines, Ltd. (R. 29). By September 6, 1943, American President Lines, Ltd., had fully satisfied all indebtedness due the United States from its earnings (R. 29–30).

a. *The Complaint.*—The instant proceeding was instituted by respondents on November 6, 1945, in the District Court for the District of Columbia (R. 1). The complaint, referring to the inability of Dollar of Delaware to obtain an operating subsidy and to that company's indebtedness to the United States (R. 3, 4, 6), alleged that the Maritime Commission required it to enter the above-described contract of August 15, 1938, as a condi-

* By a report entitled "Reorganization of American President Lines, Ltd. (formerly Dollar Steamship Lines, Inc., Ltd.)," Congress was advised on April 10, 1939, of this entire transaction, including the legal and factual justification for the outright acquisition of the Dollar of Delaware stock.

Pursuant to stipulation (R. 172–173), this report, Exhibit A–2 to the affidavit of Emory S. Land, has not been reprinted.

tion to the granting of a subsidy (R. 4–5). A copy of the contract was attached to the complaint (R. 8–18). The complaint further alleged that Dollar of Delaware had been faced with the alternative of executing the contract or of becoming unable to meet its obligations as they accrued, and that the company was thus involuntarily forced to enter into the contract (R. 5). After characterizing the transfer of stock of respondents to the United States under the contract as "in fact and in legal effect" collateral security for the indebtedness of Dollar of Delaware to the United States (R. 6), the complaint charged that the contract was unauthorized and prohibited by the Merchant Marine Act and was accordingly unenforceable, and that legal title to the stock could not have been acquired pursuant to its terms (R. 6). The complaint alleged possession of the stock by petitioners under a claim of absolute ownership by the United States (R. 6), and sought to enjoin the then members of the Maritime Commission from selling the stock and to require them to turn it over to respondents (R. 7–8).[7]

b. *Proceedings in the District Court.*—A tem-

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[7] On or about July 6, 1943, the Maritime Commission publicly offered the stock here involved for sale (R. 30). Proposals received were considered and rejected on October 19, 1943 (R. 30). At the time of the institution of this suit, the Commission had under consideration substantial offers to purchase the stock (R. 30), but has, of course, taken no action with regard to such offers.

porary restraining order was issued against petitioners and a hearing on respondents' prayer for preliminary injunction was held on November 15, 1945 (R. 82). In affidavits opposing the prayer for an injunction, petitioners showed the facts set forth *supra*, pp. 4–8, and, in addition, that they had no personal interest in the subject matter of the suit (R. 22); that the stock in issue has been listed as an asset by the Commission in annual reports to Congress (R. 102–103); that respondents' counsel in closing the contract of August, 1938, had advised the Commission that valid title to the stock, free and clear, would be conveyed (R. 27–28); that counsel for respondent Estate of Dollar, to convey its stock in accordance with the contract, had petitioned a California court for, and obtained, an order authorizing the sale of the stock (R. 28); and that respondents Dollar, Lorber, and Dollar of California had, in 1938, reported the stock transaction here in issue as an absolute transfer for federal income tax purposes, taking credit for losses (R. 55–56).

At the November 15 hearing, petitioners suggested lack of jurisdiction to the district judge on the ground that the suit was one against the United States without its consent (R. 97–98). The district judge held a second hearing on December 20, 1945, on the question of jurisdiction (R. 111, 115).

Respondents offered no evidence. Admitting that the stock in question had been lawfully acquired and held by the United States until American President Lines had discharged its obligations to the Government in November 1943, respondents stated that their cause of action was for the return of pledged stock upon the satisfaction by the company of the underlying obligation (R. 123, 137, 143, 146–147). At the close of their argument, respondents stated that there was "* * * no real dispute upon the facts * * *" and urged the court to make final disposition of the case (R. 148).

The district judge dismissed the complaint on his own motion, stating: "I think two things. * * * this transaction was legal, in the sense that the Commission had the legal right; and therefore * * * it is inescapable that this is a suit against the United States * * *" (R. 152). An order was entered on December 21, 1945, denying the motion for a preliminary injunction and dismissing the complaint (R. 39).

c. *Proceedings in the Court of Appeals.*—The court below, on March 18, 1946, reversed the judgment of the district court and remanded the case for further proceedings not inconsistent with its opinion" (R. 171–172). It held that, since petitioners had not answered or moved for summary judgment, the "* * * proceedings below went only to the motion for a preliminary injunction

* * *" (R. 163). Accordingly, the court below stated that it must treat the case as having gone off on a motion to dismiss and, invoking a rule against speaking demurrers, refused to consider the evidence submitted by petitioners and limited itself to an examination of the allegations of the complaint (R. 164, 170).[8]

Adopting the pledge theory of respondents' cause of action, the court below held that the complaint stated a claim upon which relief could be granted, subject to the question of jurisdiction over suits against the United States (R. 164–166). As to the jurisdictional problem, it stated that, in a suit against a government officer which involved the question of suit against the United States, the preliminary decision for jurisdictional purposes is identical with the ultimate question in the suit and, accordingly, assertions of the complaint of

[8] The court below recognized that "* * * most, if not all, of the substantive elements necessary to a decision on the merits * * *" (R. 163) had been adduced by the parties in the district court. As noted above, both parties had agreed in the hearings before the district judge that no material issues of fact were presented (R. 112, 148). However, the court below, after limiting its review to the allegations of the complaint, referred to the "* * * complex and important substantive issues involved * * *," (R. 164) and referred to "* * * controversial questions of * * * fact proper for presentation to a trial court" (R. 170). Since the court below settled the jurisdictional defense adversely to petitioners, further proceedings in the district court would necessarily consist of a formal trial to establish facts already of record.

want of power in the officers are to be accepted at face value (R. 167–168). In applying that test, the court discussed the nature of the Maritime Commission and held that Congress had intended it to be a suable entity, a conclusion which was felt to support its view that the present suit was one within the jurisdiction of the district court (R. 168–170).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In failing to hold that this suit is one against the United States to which the United States has not consented.

2. In holding that the United States Maritime Commission is a suable entity.

3. In holding that the district court has jurisdiction of this suit.

4. In holding that the affidavits filed by petitioners could not be considered in determining the essential nature of this suit.

5. In holding that the district court was bound by the allegations of the complaint in determining whether it had jurisdiction to entertain the suit.

6. In reversing the judgment of the district court dismissing the complaint in this action.

REASONS FOR GRANTING THE WRIT

1. That the instant case is a suit against the United States in which the United States has

not consented to be sued was established by the uncontroverted affidavits submitted by the petitioners, which the court below improperly rejected. Its handling of this aspect of the jurisdictional problem runs counter to hitherto accepted judicial techniques, and fails to follow applicable decisions of this Court.

(a) The court below postponed inquiry into the district courts jurisdiction until the trial on the merits (R. 167–168, 170). But the decisions of this Court make it plain that whenever it is contended that a particular proceeding constitutes a suit against the United States, the jurisdictional inquiry must precede trial on the merits. *Oregon* v. *Hitchcock*, 202 U. S. 60, 68; *Minnesota* v. *Hitchcock*, 185 U. S. 373; cf. *Transcontinental & Western Air* v. *Farley*, 71 F. (2d) 288 (C. C. A. 2), certiorari denied, 293 U. S. 603.

(b) This Court has only recently had occasion to point out that, under Section 37 of the Judicial Code (28 U. S. C. 80), a district court once put on notice that its jurisdiction is in doubt must insist that the jurisdictional facts be established by evidence. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269. As those cases show, averments in the complaint are not sufficient to confer jurisdiction where the evidence contradicts the pleadings. While, in the cases cited, the jurisdictional defect involved the sum in controversy,

the sweep of Section 37 is amply broad enough to reach the present situation, where the immunity of the sovereign defeats jurisdiction of the cause. Any apparent jurisdiction which might have been inferred from the allegations of the complaint was challenged by petitioners, and was questioned by the district judge. In this posture of the case, the Court was free to look at the uncontroverted affidavits in the record in order to determine its jurisdiction.[9]

The widest latitude in procedure and proof is accorded a district court which inquires into its jurisdiction under Section 37 of the Judicial Code. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269; *Wetmore* v. *Rymer*, 169 U. S. 115; *Morris* v. *Gilmer*, 129 U. S. 315. In disregard of those decisions, and in the face of the flexible procedure there applied and approved, the court below has narrowly limited the scope of the jurisdictional inquiry by thus requiring a return to the rigid common law procedure which existed prior

[9] As petitioners pointed out in the court below, respondents' motion for a preliminary injunction necessarily put into issue the question of the court's jurisdiction (R. 107, 112). Cf. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 52–53. As a matter of settled practice, affidavits are a proper means of answering such a motion, and, standing undenied, may be presumed true. 3 Moore, *Federal Practice*, 3322. They are also proper on inquiries by district courts into their own jurisdiction under Section 37 of the Judicial Code. *Wetmore* v. *Rymer*, 169 U. S. 115; *Morris* v. *Gilmer*, 129 U. S. 315.

to the original enactment of Section 37 in 1875,[10] as to which see *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 183, the decision below sets back the clock by seventy years in an important aspect of federal procedure.

2. The complaint shows on its face that the suit is one against the United States. Paragraph 28 alleges that the stock now in question was transferred to the United States Maritime Commission (R. 6). Paragraphs 29 and 33 allege in addition that the stock is now held by agents of the United States under a claim of absolute ownership by the United States (R. 6–7). As a matter of law, in view of the circumstance that the Maritime Commission is merely an agency of the United States (46 U. S. C. 1111), possession of and documentary title[11] to the stock were, upon transfer to the Commission, conveyed to the United States. Cf. *Belknap* v. *Schild*, 161 U. S. 10, 25. Inasmuch as the complaint puts the United States' title in issue, the United States is an indispensable party; and, since it cannot be sued behind its back (*Louisiana* v. *Garfield*, 211 U. S. 70, 78), there is no jurisdiction in the absence of consent by the United States. See *Mine*

[10] As Section 5 of the Act of March 3, 1875, 18 Stat. 470, 472. For its subsequent transformation into Section 37 of the Judicial Code, see *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U. S. 283, 287–288.

[11] California Civil Code, Sec. 330.1; cf. *Radio Electronic Television Corp.* v. *Bartnicw Distributing Corp.*, 32 F. Supp. 431 (S. D. N. Y.).

Safety Co. v. *Forrestal*, 326 U. S. 371; *Morrison* v. *Work*, 266 U. S. 481; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Cunningham* v. *Macon & Brunswick* R. R. Co., 109 U. S. 446; cf. *Goldberg* v. *Daniels*, 231 U. S. 218.

Respondents' view, pressed in both courts below, that the action seeks the return of property pledged to secure a debt now said to be extinguished, simply emphasizes that the purpose of the suit is the specific performance of a contract with the United States. Here again, the United States is an indispensable party; it has not consented to be sued. The nominal defendants have no personal interest in the subject matter of the suit, and defend only as officers of the United States, the real party against whom the relief sought would necessarily run. For the relief sought by the respondents—the return of the allegedly pledged stock—could only be effected by petitioners (or by their successors in office) acting in an official capacity.[12] Such proceedings, as this Court (and, prior to this case, the court below) has consistently held, cannot be maintained in the absence of consent by the United States. *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371; *Morrison* v. *Work*, 266 U. S. 481; *Wells* v. *Roper*, 246 U. S. 335;

[12] *United States* v. *Lee*, 106 U. S. 196, and other trespass cases, *e. g.*, *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, relied upon by the court below, are not applicable. A judgment against petitioners herein in their individual capacities could not afford respondents the relief which they seek.

Belknap v. *Schild*, 161 U. S. 10, 18; *Hagood* v. *Southern*, 117 U. S. 52; *Louisiana* v. *Jumel*, 107 U. S. 711; *Boeing Air Transport* v. *Farley*, 75 F. (2d) 765 (App. D. C.), certiorari denied sub nom. *Pacific Air Transport* v. *Farley*, 294 U. S. 728; *Transcontinental & Western Air* v. *Farley*, 71 F. (2d) 288 (C. C. A. 2), certiorari denied, 293 U. S. 603; *Shoshone Irr. Dist.* v. *Ickes*, 70 F. (2d) 771 (App. D. C.), certiorari denied, 293 U. S. 571.

The court below, however, disregarded paragraphs 28, 29 and 33 of the complaint, in which the essential allegations were contained, and failed to give effect to the applicable decisions of this Court cited above.

3. The court below erroneously held that the Maritime Commission was a suable entity (R. 168–170), a result which it reached by finding an implied waiver of governmental immunity in the power-to-contract clause of Section 207 of the Merchant Marine Act of 1936, *supra*, p. 4.

This conclusion disregards the plain provisions of Section 201 of the Merchant Marine Act, *supra*, p. 4, which states that the Maritime Commission is an agency of the United States. The decision holds the Maritime Commission suable, in the absence of an express waiver by Congress; there is no "sue-and-be-sued" provision in the Merchant Marine Act. So far as immunity from suit is concerned, it is obviously of no significance that the Commission is empowered by Section 207 to

contract and otherwise carry its activities "in the same manner in which a private corporation may contract within the scope of the authority conferred by its charter." Every authorized activity of the United States is an exercise of governmental power, *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, and, except where Congress has waived it, federal immunity is coextensive with the entire scope of federal power. The broad authority to contract granted the Commission by Section 207 was deemed necessary in view of the complex business transactions contemplated for that agency by the Act which created it. To read into the provisions of Section 207 a waiver of immunity disregards a long line of decisions of this Court which prohibit such relinquishment of sovereign immunity by implication. *United States* v. *Sherwood*, 312 U. S. 584, 590; *United States* v. *Michel*, 282 U. S. 656; *Price* v. *United States*, 174 U. S. 373; *Schillinger* v. *United States*, 155 U. S. 163; cf. *United States* v. *Shaw*, 309 U. S. 495; *United States* v. *U. S. Fidelity Co.*, 309 U. S. 506.

4. The questions are of general importance. The decision below, in both its procedural and substantive aspects, will control the courts of the District of Columbia where most suits against government agencies originate. It is important not only that the waiver of immunity be not ex-

tended beyond the scope expressly authorized by Congress and in disregard of principles long announced by this Court, but also that the courts follow a procedure adapted "to secure the just, speedy, and inexpensive determination" (F. R. Civ. P., Rule 1) of jurisdictional questions on which the right to maintain an action depends.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

JUNE 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946